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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

CITY OF SCRANTON AND MILTON J. SHAPP, *Appellants*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court for the Southern District of New York

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JURISDICTIONAL STATEMENT

City of Scranton (Scranton) and Milton J. Shapp (Shapp) appeal from the Order of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing their respective intervening complaints in the Penn-Central merger case with prejudice pursuant to 41 (b) F.R. Civ. P., and submit this Statement to show that the Supreme

Court of the United States has jurisdiction of the appeal and that substantial questions are presented. Scranton and Shapp were not parties to the district court proceedings involving the so-called N&W Inclusion case.

OPINIONS BELOW

The three-judge district court for the Southern District of New York issued four opinions, one dated July 3, 1967, two dated July 26, 1967, and one dated October 19, 1967, none of which are yet reported.

The opinion of July 3, 1967 is set forth as Appendix A to the jurisdictional statement in No. 778, *Baltimore and Ohio Railroad Company, et al.* v. *United States.*

The two opinions of July 26, 1967 are set forth herein as Appendix A.

The opinion of October 19, 1967 is set forth as Appendix B to the jurisdictional statement in No. 778, *Baltimore and Ohio Railroad Company, et al.* v. *United States.*

The report and order of the Interstate Commerce Commission in *Pennsylvania R. Co.-Merger-New York Central R. Co.,* dated June 9, 1967, is reported at 330 I.C.C. 328.

JURISDICTION

Scranton and Shapp were intervening plaintiffs to an action by Erie-Lackawanna Railroad Company brought in September 1966 under Title 5, U.S.C. Section 704 and Title 28, U.S.C. Sections 1336, 2284 and 2321-25 to enjoin, annul and set aside orders of the Interstate Commerce Commission (I.C.C.) dated April 6 and September 16, 1966, which approved and authorized the merger of The Pennsylvania Railroad

Company (PRR) and The New York Central Railroad Company (NYC).[1] The order of the district court dismissing the intervening complaints of Scranton and Shapp was entered on October 19, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

QUESTIONS PRESENTED

The district court dismissed with prejudice the intervening complaints of Scranton (filed September 27, 1966) and Shapp (filed September 13, 1966 and supplemented September 22, 1966) upon motion of the United States and Interstate Commerce Commission, joined by PRR and NYC, for failure of Scranton and Shapp to supplement their earlier complaints so as to attack the June 9, 1967 order of the I.C.C. in the Penn-Central case.[2] The order of dismissal was based upon 41 (b) F.R. Civ. P. While the district court entertained no doubt of the sufficiency of the dismissal on that ground, it thought it well to add that it finds no merit in the complaints on the ground that appellants' attacks simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission. (No. 778, J.S. App. B8-B9)

The following questions are presented:

1. Is not an attack by intervenors in a three-judge court against a specific order of the Interstate Commerce Commission rendered moot by a

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[1] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475 and 328 I.C.C. 304 (1966).

[2] 330 I.C.C. 328 (1967).

later order entered by the Commission as a result of a remand directed by the Supreme Court?

2. Should a statutory court dismiss with prejudice the claims of intervenors who had appeared with respect to a prior order of the Interstate Commerce Commission, but who chose not to litigate in that court but rather to litigate in another court where they could attack not only the subsequent order but also another order, both of which were admittedly inextricably interwoven?

3. Where there is a dismissal on the merits, based on a refusal to litigate in that court, particularly when the case involves one of the most important mergers in the history of the United States, is it not mandatory that there be findings of fact and conclusions of law as to all the significant issues of grave public concern?

STATUTES INVOLVED

The statutes involved in this case are Judicial Code, 28 U.S.C. Sections 1253, 1336, 2101 (b), 2284, 2321-25; Interstate Commerce Act, 49 U.S.C. Section 5(2). The text of these statutes is set forth in Appendix C to the jurisdictional statement in No. 778, *Baltimore and Ohio Railroad Company, et al.* v. *United States.*

Rule 41 (b) of the Federal Rules of Civil Procedure is set forth herein as Appendix B.

STATEMENT

Scranton and Shapp in September 1966 intervened in the action brought by Erie-Lackawanna Railroad Company to set aside and enjoin the orders of the Interstate Commerce Commission dated April 6 and September 16, 1966 which at that time approved and au-

thorized merger of The Pennsylvania Railroad Company and The New York Central Railroad Company.[3] Intervenors supported the motions of various railroad plaintiffs seeking a temporary injunction of the merger orders.

The district court, on October 4, 1966, denied a temporary injunction of the I.C.C. orders in *Erie-Lackawanna R. Co.* v. *United States,* 259 F. Supp. 964 (S.D. N.Y. 1966). Consummation of the Penn-Central merger was stayed by the Supreme Court, 385 U.S. 914. On March 27, 1967 the Supreme Court reversed the judgment of the district court and remanded the cause with instructions that it be remanded to the I.C.C. for further proceedings. *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 392 (1967).

The subsequent order of the district court on mandate of the Supreme Court was entered April 28, 1967. It read:

"IT IS ORDERED that:

1. The order of this court entered on October 4, 1966, denying a temporary injunction is vacated;

2. The cause is remanded to the Interstate Commerce Commission for further proceedings not inconsistent with the Supreme Court's opinion of March 27, 1967;

3. The orders of the Interstate Commerce Commission entered on April 6 and September 19, 1966, in Finance Docket No. 21989 and 21990, insofar as they authorize the immediate consummation of the proposed merger between the Pennsylvania Railroad Company and the New York Central Rail-

[3] 327 I.C.C. 475 and 328 I.C.C. 304 (1966).

road Company, are enjoined pending the completion of the proceedings directed by the Supreme Court."

The various parties to the Supreme Court proceedings thereupon made their respective positions known to the I.C.C. as to the type of further proceedings that should be undertaken by the agency. The Commission denied petitions to consolidate *Penn-Central* with the N&W Inclusion [4] proceeding, and denied petitions by Scranton and Shapp which sought further hearings. Instead, on June 12, 1967, the agency released simultaneously separate reports in Penn-Central and N&W Inclusion, each dated June 9, 1967.

Events Subsequent to June 12, 1967

N&W brought an action to set aside the I.C.C.'s *N&W Inclusion* order on June 13, 1967 in the Western District of Virginia. On June 16, 1967 the railroad parties to the former district court proceeding met with the I.C.C. and U.S., and discussed the future course of Penn-Central with the three judges in chambers. Scranton and Shapp were not invited to this conference. Two show cause orders for motions were subsequently issued: (1) At the request of PRR and NYC that parties supplement their complaints in Penn-Central to embrace the June 9, 1967 I.C.C. order or be dismissed with prejudice; (2) At the request of N&W and its allies that the April 28, 1967 order on mandate of the Supreme Court be amended so as to enjoin the June 9, 1967 order in Penn-Central.

Also, on June 16, 1967, the Erie-Lackawanna Railroad Company brought a single action in the district

[4] *Norfolk & W. Ry. Co. and New York, Chicago & St. Louis*, 330 I.C.C. 780 (1967).

court which sought (1) to enforce the I.C.C. order in N&W Inclusion, and (2) to enjoin consummation of Penn-Central pending determination of the enforcement of N&W Inclusion.[5] E-L subsequently moved to consolidate its action with the prior Penn-Central actions.

The district court set hearing for June 28, 1967 on the motions made pursuant to the show cause orders and E-L's motion for consolidation. Returns to the show cause motions were made June 27, 1967. Other developments prior to the June 28, 1967 hearing were: (1) D&H instituted an action June 23, 1967 limited to certain features of N&W Inclusion,[6] and (2) Borough of Moosic instituted a consolidated action June 26, 1967 in the Middle District of Pennsylvania against the Penn-Central and N&W Inclusion orders of June 9, 1967.[7]

Opinion of July 3, 1967

N&W and its allies threatened to institute actions against the Penn-Central order of June 9, 1967 in numerous district courts. The June 28, 1967 hearing in the district court revealed a general consensus among the railroad parties that Penn-Central would be heard in New York and that N&W Inclusion would be heard in Virginia. PRR, NYC and N&W all opposed E-L's attempt to consolidate Penn-Central with its *N&W*

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[5] *Erie-Lackawanna Railroad Company* v. *United States* and *Norfolk & Western Ry. Co.* (67 Civ. 2362, S.D.N.Y.).

[6] *Delaware & Hudson R. Corp.* v. *United States* (67 Civ. 2451, S.D.N.Y.); Boston & Maine intervened as a plaintiff.

[7] *Borough of Moosic* v. *United States* (No. 10054-Civil, M.D. Pa.); Scranton and Shapp intervened as plaintiffs. Intervention was denied City of Pottsville. See: No. 4433, *City of Pottsville* v. *U.S.*

Inclusion enforcement action, and the E-L action itself was subsequently discontinued.

The district court on July 3, 1967 issued its memorandum order granting the PRR-NYC motion to require all parties to supplement their September, 1966 complaints or be dismissed with prejudice. The court also temporarily enjoined the June 9, 1967 I.C.C. order in Penn-Central. A briefing and hearing schedule was ordered. The court contemplated in its opinion that N&W Inclusion would not be heard in the Southern District of New York.

Opinions of July 26, 1967

Scranton and Shapp on July 17, 1967 moved the district court that they be permitted to withdraw from the Penn-Central proceeding or that the action be stayed pending resolution of the *Moosic* case in the Middle District of Pennsylvania.

The I.C.C. and U.S. on July 20, 1967 moved the district court to (1) enjoin Scranton, Shapp and N&W from participating, respectively, in the Middle District of Pennsylvania and Virginia proceedings; and (2) join N&W as an involuntary plaintiff to D&H's action in N&W Inclusion and to establish a briefing and hearing schedule in that cause.

Prior to July 20, 1967 the Middle District of Pennsylvania had stayed the *Moosic* case, which attacks Penn-Central and N&W Inclusion, until October 1, 1967 or until further order of the court; the Virginia court had established a briefing and hearing schedule for N&W Inclusion.

The district court denied the motion to enjoin Scranton, Shapp and N&W from participating in other pro-

ceedings. The court denied permission for Scranton and Shapp to withdraw from the Penn-Central case or to stay its Penn-Central proceeding. The court granted the motion to join N&W as an involuntary plaintiff to D&H's N&W Inclusion action. The court set a briefing, hearing, and argument schedule for N&W Inclusion separate and apart from Penn-Central. The court, *sua sponte,* gave Scranton and Shapp until August 2, 1967 to amend their complaints in Penn-Central, and extended an invitation to Moosic and Pottsville to intervene.

Scranton and Shapp on August 2, 1967 filed their statement of objections to the court's order. Their basic objections, which they had previously expressed, were that Penn-Central and N&W Inclusion were being split into separate proceedings and that the district court did not have jurisdiction over them with respect to the June 9, 1967 order in Penn-Central. The pleading and briefing schedule in N&W Inclusion did not commence until August 14, 1967 because the Commission's report and order on reconsideration in N&W Inclusion was not issued until that date.

Opinion of October 19, 1967

The district court heard Penn-Central on September 18, 1967. Hearing on N&W Inclusion was held September 28, 1967, with reply briefs submitted October 5, 1967. The district court rendered its opinion in both proceedings on October 19, 1967. The court granted the motion of the I.C.C. and U.S., joined in by PRR and NYC, that Scranton and Shapp be dismissed with prejudice in Penn-Central, pursuant to 41(b) F.R. Civ. P., for failure to file supplemental complaints attacking the June 9, 1967 order of the I.C.C. in Penn-

Central. The court added that it found no merit to the complaints of Scranton and Shapp,[8] stating that their attacks simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission. (No. 778, J.S. App. B8-B9)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The June 9, 1967 Order of the I.C.C. After Remand From the Supreme Court Mooted the Earlier Intervention of Appellants in the District Court's Penn-Central Case.

The order of the district court on mandate of the Supreme Court in *B. & O. R. Co.* v. *United States, supra,* was entered April 28, 1967. That order remanded the Penn-Central cause to the I.C.C. for further proceedings not inconsistent with the Supreme Court opinion. All that remained in the district court was an injunction preventing consummation of the merger pending completion of the I.C.C. proceedings directed by the Supreme Court. This injunction disappeared immediately upon issuance of the June 9, 1967 order of the I.C.C., which order established July 17, 1967 as the new effective date after which the merger could be consummated.

The only basis for any continuing jurisdiction by the district court would have been if the I.C.C.'s order of June 9, 1967 in Penn-Central were found to be inconsistent with the mandate of the Supreme Court or the district court. The district court on July 3, 1967 did not find any inconsistency. Rather, the district court concluded only to amend its mandate order and thus enjoin the merger pending hearing and determination

[8] The U.S. and I.C.C. did not answer the complaints of Scranton and Shapp.

of the objections to the supplemental report in Penn-Central.[9] (No. 778, J.S. App. A-15) The thrust of the district court's amendment of its order on mandate of the Supreme Court was therefore unrelated to any I.C.C. violation of the Supreme Court or district court mandates, but was simply comparable to the issuance of an ordinary temporary injunction pending judicial review of a new law suit.

It follows that the district court was without jurisdiction to require Scranton and Shapp to file amended complaints in Penn-Central since the cause had been remanded on April 28, 1967 to the I.C.C. The I.C.C. orders of April 6 and September 16, 1966 were mooted by the June 9, 1967 order after remand. This is recognized by the district court in its judgment of October 19, 1967, where the June 9, 1967 order is the only effective I.C.C. order deemed to authorize consummation of the merger. (No. 778, J.S. App. B-71)

In a situation involving remand of an action by the Supreme Court to an agency through an initial reviewing court, the Court of Appeals for the District of Columbia held that a subsequent order of the agency gave rise to a new action. *Sierra Pac. Power Co.* v. *F.P.C.*, 223 F. 2d 605, 609 (D.C. Cir. 1955), aff'd *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956). *Pacific Gas & Elec. Co.* v. *F.P.C.*, 272 F. 2d 510 (D.C. Cir. 1958).

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[9] The parties seeking amendment of the April 28, 1967 order urged that consummation of Penn-Central must be enjoined pending judicial review of N&W Inclusion to comply with the Supreme Court mandate.

II. The District Court Should Have Granted Appellants Leave To Withdraw From the Penn-Central Action.

The various procedural developments in the district court boil down to a basic conflict between the railroad parties and Scranton and Shapp. The Commission had refused to consolidate Penn-Central with N&W Inclusion, even after remand in *B. & O. R. Co.* v. *United States.* The railroad parties preferred the case-by-case resolution of the eastern railroad unification applications. N&W, which became a party to the Commission's Penn-Central proceeding only in September 1966,[10] insisted upon a separate judicial review for N&W Inclusion, and promptly filed suit on June 13, 1967 in the Western District of Virginia to insure such separate consideration.

N&W was not alone in desiring separate court proceedings for Penn-Central and for N&W Inclusion. Its position was actively supported by PRR and NYC before the district court.[11] The July 3, 1967 opinion of the district court contemplated that it would only hear Penn-Central; N&W Inclusion would be heard elsewhere. (No. 778, J.S. App. A-17)

An inherent conflict, giving rise to this appeal, arose when the U.S. and I.C.C. sought to join N&W as an involuntary plaintiff to D&H's N&W Inclusion action in the district court, and to establish a separate pleading, briefing and argument schedule. Scranton and Shapp had moved that they be granted leave to withdraw from the Penn-Central proceeding. All of these motions were heard July 25, 1967. The N&W desire for separate review of N&W Inclusion ran counter to

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[10] The Commission granted N&W very limited intervention in Penn-Central, 328 I.C.C. 304, 306, 328-29.

[11] Only E-L initially desired consolidation in the district court.

Scranton and Shapp's desire that Penn-Central and N&W Inclusion be heard together. A major impediment to consolidated pleading and briefing was that the Commission's report on reconsideration in N&W Inclusion was not released until August 14, 1967. The district court's procedure for N&W Inclusion (identical with the Virginia Court) provided for the filing of supplemental complaints 7 days thereafter, and initial briefs 18 days thereafter. This conflicted with the August 8, 1967 date for initial briefs in Penn-Central. Moreover, there were parties to D&H's N&W Inclusion case that were not parties to the Penn-Central action.

The U.S. and I.C.C. did not seek to join Scranton and Shapp as involuntary plaintiffs to the district court's N&W Inclusion case, yet opposed their withdrawal from the Penn-Central action. The district court's memorandum orders of July 26, 1967 (Appendix A herein) clearly indicated that the court considered Penn-Central and N&W Inclusion to be separate cases.

The question of dismissal with prejudice pursuant to 41(b) F.R. Civ. P. is one for the discretion of a court, and depends on the facts of a particular situation. 5 Moore Fed. Practice at p. 1115-40. Appellants submit that the district court abused its discretion in failing to dismiss Scranton and Shapp *without* prejudice under the circumstances. The I.C.C. had declined to consolidate the two matters, but this does not preclude consolidated pleadings, briefs and argument by a reviewing court. The difficulty in the district court was that N&W, having been given only limited intervention in the Commission's Penn-Central proceeding and insisting upon separate judicial review of Penn-Central and N&W Inclusion, strongly opposed

consolidation. Its position was supported by the other railroads, tacitly or openly, with the exception of E-L. This situation called for the withdrawal of Scranton and Shapp from the district court's Penn-Central proceeding so that they could attack Penn-Central and N&W Inclusion on a consolidated basis in the Middle District of Pennsylvania. City of Scranton is served by E-L, D&H and CNJ. It is not served by PRR or NYC. Accordingly, it cannot realistically attack Penn-Central and N&W Inclusion in separate proceedings.

Support for appellants' contention that Penn-Central and N&W Inclusion are sufficiently related to warrant consolidated judicial review does not merely stem from this Court's opinion in *B. & O. R. Co.* v. *United States*, but is also apparent from the very language employed by the I.C.C. and U.S. in seeking to have the district court enjoin Scranton and Shapp from participation in the Middle District of Pennsylvania. The memorandum in support of an injunction against them termed Penn-Central and N&W Inclusion to have been "wholly intertwined" since June, 1964; further, that the two proceedings were "wholly interrelated" and "completely intertwined." The memorandum submitted by the United States to the Supreme Court in *B. & O. R. Co.* v. *United States* urged consolidated judicial review as a substitute for remand of Penn-Central to the I.C.C. for consolidation. (*Memo*, pp. 30-32) Now, in this Court, No. 778 (Penn-Central) and No. 779 (N&W Inclusion) have been consolidated for all purposes. Such consolidation should have been made in the I.C.C. proceedings.

The district court erred in dismissing Scranton and Shapp with prejudice. Their motion for leave to withdraw should have been granted.

III. The Substantial Issues Raised By Appellants Are Not Matters Committed Exclusively To Agency Discretion

The district court held that the September 1966 complaints of Scranton and Shapp simply represent disagreement with procedural and policy determinations which Congress has committed to the Commission. (No. 778, J.S. App. B-9)

The initial complaint of Shapp was filed September 13, 1966, and supplemented on September 22, 1966. Scranton's complaint was filed September 27, 1966. The Scranton complaint was similar to the initial Shapp complaint. The Shapp supplemental complaint attached Shapp's July 11, 1966 petition for reconsideration to the I.C.C. as additional grounds for setting aside the I.C.C. orders of April 6 and September 16, 1966. This petition is reproduced as Section E to the Joint Appendix in Nos. 813 and 814, October Term 1966, *B. & O. R. Co.* v. *United States.* The complaint of Scranton, filed September 27, 1966, is included herein as Appendix C.

The district court erred in holding that the matters raised by appellants are committed exclusively to the Commission. Orders of the I.C.C. approving railroad mergers are subject to the full range of judicial review provided by the Administrative Procedure Act. Section 10(e) of the APA provides that agency action, findings and conclusions shall be set aside where unsupported by substantial evidence. In Penn-Central, the Commission concluded that it was dealing with a "failing industry"; that eastern district railroads, and PRR and NYC specifically, will face a continued decline in output; that the record shows no reason for optimism on applicants' traffic level; that the prospects clearly import that the merger will benefit rather than harm Pennsylvania.

The above matters, which are only illustrative of the findings and conclusions challenged by appellants, are

not immune from judicial review. Substantial evidence will not support the finding that the merger involves a "failing industry" or that traffic volume on PRR and NYC is in a secular decline. The basis for the bulk of the Commission's conclusions in approving the merger are simply irrational, and not based upon economic facts. The Congressional objectives claimed to be followed by the I.C.C. are in sharp conflict with the stated desires of Congress. Similarly, with respect to the state of Pennsylvania, appellants assert that the evidence shows a harmful impact upon its citizens.

The complaints of Scranton and Shapp also raised many issues of law. Among these were whether Transportation Act of 1940 and its national transportation policy changed the "public interest" criteria of the 1920 legislation relied upon in Penn-Central;[12] whether the I.C.C. properly declined to consider market competition between PRR and NYC in evaluating the anti-competitive consequences of the proposed transaction; whether the non-railroad activities of PRR and NYC should have been considered, both with respect to competition and as to financial viability; whether findings are required concerning interlocking directorates, combined purchasing power and reciprocity between shippers and carriers; whether further hearings and eventual consolidation with N&W Inclusion and/or the proposed N&W-C&O merger should have been ordered; and whether the recent passenger train discontinuance law, enacted as part of Transportation Act of 1958, must be considered as bearing upon Section 5(2)(c) with respect to inclusion of the New Haven railroad in the transaction.

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[12] *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25 (1932); *Texas* v. *United States*, 292 U.S. 522, 531 (1934); *United States* v. *Lowden*, 308 U.S. 225, 230 (1939). See also dissent of Douglas, J. with respect to 49 U.S.C. Section 5(2)(c) in *B. & O. R. Co.* v. *United States*.

The district court erred in holding that these issues, involving matters of law, are within the discretion of the Commission and thus immune from judicial review. The importance of the Penn-Central merger, which would constitute the largest corporate merger in our history, warrants a searching judicial review, in the national interest, prior to consummation. Since these appellants were the only parties in the district court challenging the Commission's basic finding in Penn-Central, they should have not been summarily dismissed without an adversary proceeding. The Penn-Central merger requires judicial review even if it means the appointment of special counsel to present these public interest questions.[13]

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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[13] Subsequent to the filing of appellants' application for Stay in this Court, the Middle District of Pennsylvania, upon renewed joint request of the I.C.C. and U.S., has set a schedule leading to final hearing on the merits of the complaints in the *Moosic* case, with oral argument on December 15, 1967. The *Moosic* case attacks the basic public interest and competition findings in both Penn-Central and N&W Inclusion, on a separate as well as on a consolidated basis.